UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, WASHINGTON,

Appellant,

vs.

JOHN E. SUNDQUIST, WALTER GUSTAFSON, and IZELLA J. SMITH,

Appellees.

No. 2652.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief for Appellee John E. Sundquist

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NOTE:—All page references, when not otherwise designated, are to printed transcript. The name "Sundquist" and word "Appellee" mean the appellee John E. Sundquist.

STATEMENT.

The record shows that on the 31st day of August, 1914, the appellee, John E. Sundquist, plaintiff below, had on deposit in the United States National Bank of Centralia the sum of $3,000.00, for which he held three certificates of deposit, each for the sum of $1,000.00 (Tr. p. 20). That on said 31st day of August, 1914, he went to the bank and cashed two of the certificates (Tr. p. 21), which he surrenderd to the bank and which were at said time endorsed, "Paid Aug. 31, 1914," and said endorsement signed, "Jno E. Sundquist" (Tr. pp. 22-23).

In payment of the two cancelled certificates (Deft's Ex. 1 and 2; Tr. pp. 22-23,) he received from the bank $604.00 in money and a certificate of deposit for $100.00, leaving the remaining sum of $1296.00 with the bank with instructions to apply the same in payment of a note for $1200.00, with $96.00 interest, held by Izella J. Smith, which note was secured by a mortgage (Tr. p. 21-25). The bank acepted the money for the purpose stated and, as evidence of the nature of the deposit, executed

and delivered to Sundquist a receipt as follows (Tr. p. 21):

"Plaintiff's Exhibit 'A'—Receipt of U. S. National Bank to Plaintiff.

Centralia, Wash., 190—.

Received from John E. Sundquist Twelve Hundred ninety-six dollars a|c mortgage Walter Gustafson to Izella J. Smith $1200.00 and Int. $96.00.

C. S. GILCHRIST, V. P.

$1296.00."

Four days after above transaction, to-wit, Septtember 4th, 1914, the bank wrote Miss Smith as follows (Tr. p. 27):

"Plaintiff's Exhibit 'B'—Notice.

No. 8736.

THE UNITED STATES NATIONAL BANK

Capital Stock $100,000.00.

Chas. Gilchrist, Pres.
C. S. Gilchrist, V. Pres.
Geo. Dysart, V. Pres.
J. W. Daubney, Cashier.
Ross W. Daubney, Asst. Cashier.
H. F. Gilchrist, Asst. Cashier.

Centralia, Wash.

September Fourth, Nineteen Fourteen.

Izella J. Smith,
Olympia, Wash.

Dear Madam:

Mr. Walter Gustafson of Rochester has deposited $1296.00 with us to pay a certain note and mortgage held by you. We would ask that

you forward the same direct to us with a proper release and we will be pleased to be of service in effecting settlement.

Very truly yours,

C. S. GILCHRIST,

Vice-President."

In response to this notice, Miss Smith at once caused the note and a release of the mortgage to be sent to the bank, but she never received any of the money and the note and release of the mortgage were never returned to her. Miss Smith testified as a witness in the case that she claimed no interest in the fund in controversy (Tr. p. 28).

The C. S. Gilchrist whose name is subscribed to the above receipt and letter to Miss Smith, and who represented the bank in the transaction with Mr. Sundquist, was at all said times the Vice-President of the bank (Tr. p. 21).

After making the deposit on August 31st, Sundquist called at the bank several times in regard to the matter, but never received the note nor release of the mortgage, and the money was never returned to him (Tr. p. 21).

At the time of the transaction with the appellee (Sundquist), to-wit, on August 31st, 1914, and at all times thereafter, to and including September 21st, 1914, there was sufficient cash in the bank to pay the $1296.00 deposit in controversy, and on the last named date, at which time the bank closed,

there was on hand between $20,000 and $30,000 in cash (Tr. p. 30).

On the 21st of September, 1914, the bank having become insolvent, a receiver was appointed by the Controller of the Currency, who on said date took possession of all of its assets and affairs, including the $1296.00 deposit in controversy, claiming the same to be part of the general funds or assets of the bank (Tr. pp. 8-9-33).

In addition to the receipt (Pltff's Ex. A) for $1296.00, given Sundquist on August 31st, 1914, a certificate of deposit bearing same date and for the same amount was introduced in evidence by the appellant, which reads as follows (Tr. p. 24):

"Defendants' Exhibit No. 4—Certificate of Deposit.

Centralia, Wash. Aug. 31, 1914. No. 12215.

Izella J. Smith has deposited in this bank Twelve Hundred Ninety-six dollars, $1296.00, payable to the order of herself—on return of this certificate properly indorsed.

U. S. National Bank.

J. W. DAUBNEY, Cashier.

Not subject to check.

(In pencil) from Walter Gustafson."

This certificate, however, was never issued, but remained in the possession of the bank, and was never delivered to either Sundquist or Izella J. Smith, nor seen by either of them (Tr. pp. 24-30).

The appellee, John E. Sundquist, brought this action to recover the $1296.00 as a special deposit.

ARGUMENT.

The appellee submits to this Court the foreging statement for the reason that the statement in appellant's brief is incomplete, in that it does not include what, in our opinion, are the vital and controlling facts in the case, and gives undue prominence to comparatively immaterial matters, and is therefore unfair and misleading.

We assume that the conclusions of fact reached by the District Judge, as shown by the decree entered in the court below, will be accepted by this court as conclusive in so far as the same are not contradicted by undisputed evidence contained in the record, and that therefore, where the abstract is not convincing, or the testimony conflicting, the findings of the trial court will be given the weight usually acorded to verdicts of juries in like cases.

In its final decree herein, the lower court held (Tr. pp. 32 and 33):

> " * * * that on or about the 31st day of August, 1914, the plaintiff, John E. Sundquist, deposited in said United States National Bank of Centralia, Washington, the sum of $1296.00 in lawful money of the United States under an express contract and agreement with said bank that said sum of money should be

by said bank applied in payment of a certain promissory note and mortgage, said note and mortgage being for the principal sum of $1200.00, and the remaining sum of $96.00 being for interest thereon, said note and mortgage being made and executed by the said defendant, Walter Gustafson, payable to the order of the defendant, Izella J. Smith, and at said time owned and held by said defendant, Izella J. Smith, and that at said time it was agreed by and between the plaintiff and said bank that said $1296.00 should be paid to said defendant, Izella J. Smith, in satisfaction of said mortgage and discharge of said debt and not for any other purpose; that said bank failed and neglected to pay said money, or any part thereof, to said Izella J. Smith, and retained and held the same and the whole thereof until said bank became insolvent on or about the 21st day of September, 1914, at which time Francis A. Chapman was appointed Receiver of said bank and as such Receiver obtained possession and control of all of the property and assets of said bank, including said sum of $1296.00 deposited by the plaintiff; that thereafer, the defendant Clinton A. Snowden succeeded the said Francis A. Chapman as Receiver of said bank, and came into possession, and is now in possession of all of said property and assets, including said sum of $1296.00 deposited by the plaintiff; and it further appearing to the court that the said deposit of $1296.00 made by the plaintiff was, and is, a special deposit and trust fund in said bank and in the hands and possession of said Receiver, and that the plaintiff is entitled to the same. It is therefore ordered, etc."

The controlling question in this case is, Was this $1296.00 deposit in controversy, made by John E. Sundquist and accepted by the United States National Bank of Centralia under an agreement, or with the understanding, that the money should be applied in payment of the note and mortgage held by Izella J. Smith? If the money was left in the bank under an agreement of that kind, then the deposit was special and the money is not an asset of the bank in the hands of the receiver.

The witnesses who testified to the conversation between Gilchrist, vice-president of the bank, and Sundquist, at the time the deposit was made, all say that Sundquist told Mr. Gilchrist that he wanted the $1296.00 applied in payment of the note and mortgage held by Izella J. Smith, and that Mr. Gilchrist accepted the money upon that condition and agreed to apply it as directed (Tr. pp. 20 to 30, inclusive).

The agreement between them is further shown by the receipt given Sundquist (Pltff's Ex. A; Tr. p. 21), and the notice by the bank to Miss Smith that the money had been deposited for the purpose of paying the note and mortgage held by her, and asking her to send note and release of mortgage (Pltff's Ex. B; Tr. p. 27).

The receipt is a written contract between the bank and Sundquist, and, when considered in con-

nection with the letter to Miss Smith, conclusively establishes the fact that the bank received the money as a special deposit under an express contract to apply the same in payment of the note and mortgage held by Miss Smith.

As to whether the deposit in controversy was general or special, and upon the question of the conclusiveness of the receipt given the depositor, the case of *Carlson vs. Kies*, 75 Wash. 171, is directly in point. In that case the Supreme Court of Washington says:

> "Desiring to hold the money until the return of proper vouchers which he had forwarded to them, he placed the money in the Commercial Bank, and received from it a receipt therefor, written at his instance and signed by the cashier, as follows:
>
> 'Vancouver, Wash., Dec. 14, 1910. 190.
> 'Received from Fred Olson Three Thousand seventy and 60-100 Dollars, to be held until receipts are received from heirs. Then same to be forwarded by bank draft.
>
> G. W. DANIELS,
> Cashier.'
>
> (Margin) The Commercial Bank, Vancouver, Wash.' "
>
> "* * * A deposit in a bank is either general or special. Where a general deposit is made, it is either credited to the account of a depositor subject to his check or evidenced by a demand or time certificate. The title to the deposit in such cases passes to the bank

and it becomes the debtor of the depositor. On the other hand, when a bank accepts a special deposit, it becomes a trustee of the depositor and holds the money subject to the trust. *The receipt itself affords strong, if not conclusive evidence, of a special deposit. It shows that the money was placed in the bank for a special purpose.* Fortified by the evidence of the depositor and the admitted circumstances here present, it is obvious that both parties to the transaction intended to make a special and not a general deposit. It follows, therefore, that the bank holds the money, not as a general debtor, but in a fiduciary capacity."

Among the cases relating to special deposits as affected by receipts and certificates of deposit are the following:

In the case of *Woodhouse vs. Crandall*, 64 N. E. Rep. 292 (Ill.), $1500.00 was deposited in the bank and a receipt given the depositor, reciting that the fund was to be held for the period of one year as security for the faithful performance of the conditions of a certain lease. The bank, as in this case, made out a certificate of deposit, which was never delivered to anyone, reciting that the money was payable on return of the certificate properly endorsed. It was held that the receipt specified the terms and conditions of the deposit and showed it to be for a special purpose, and that the certificate of deposit was a mere memorandum by the bank to distinguish and identify the fund; it in no man-

ner affected the contract of the parties as shown by the receipt.

Another state case in which a certificate of deposit was given is *Shopert vs. Indiana National Bank*, 83 N. E. Rep. 515 (Ind.). The depositor placed money in the bank under an agreement that the bank should pay it to a third person, provided a machine the third person had sold to the depositor complied with the warranty after ten days' trial. The agreement between the parties was oral, but one of the officers of the bank received the money and wrote a certificate of deposit in the presence of the depositor, but the depositor did not see the certificate or know anything of its contents. The certificate was in the usual form payable to the third person on "return of this certificate properly endorsed," with the addition of the following words: "provided husker fills guaranty after ten days' trial." This certificate was placed in an envelope and retained by the bank. The husker was unsatisfactory and was returned; the bank failed and the receiver claimed the money as part of the general funds of the bank; held, a special deposit and not the property of the bank.

In their statement of the case and argument, counsel for appellant entirely ignore the receipt given Sundquist, and the letter to Miss Smith, apparently preferring to rely upon certain answers

of Sundquist on cross-examination, relating to an alleged certificate of deposit, which was never issued (Tr. p. 24).

Considering the entire testimony of Sundquist, both direct and cross-examination (Tr. pp. 20 to 24), and also the testimony of Gustafson (Tr. pp. 24 to 26) and Gilchrist (Tr. pp. 24 to 30), we think it is evident the words "receipt" and "certificate of deposit" mean one and the same thing to him. In fact it may be said that a certificate of deposit is always a receipt, and in this particular instance the one introduced in evidence (Tr. p. 24. Deft's Ex. 4), is nothing but a receipt. It recites that "Izella J. Smith has deposited in this bank $1296.00 payable to the order of herself" (which is not true), and then goes on to say that the money would be paid to her upon return of the certificate, etc. How could Miss Smith return it to the bank when it was never in her possession and she had no knowledge of its existence? This precious document was probably carefully locked up in the bank with the note, mortgage and release of mortgage and the $1296.00 belonging to Sundquist, and is now brought to light for the first time for the purpose of this suit.

In this copy of this alleged certificate of deposit in favor of Miss Smith, as set out in appellant's statement of the case, the pencil notation, "from Walter Gustafson," is omitted (Tr. p. 24; App.

brief p. 1). We now ask counsel to explain to this court why a *true* copy was not given, including the notation. In presenting copies of written instruments, true and complete copies should be given, and questions of materiality left to the court. The notation tends to sustain our contention that the deposit was there for the special purpose of paying the note and mortgage of Gustafson held by Miss Smith.

NEW CONTRACT NOT CHANGE OF CREDIT.

Appellant assumes as a basis for the argument presented in his brief, that the transaction between Sundquist and the bank was simply a change or transfer of credit,—a mere matter of bookkeeping; that a general deposit of $2000.00 to his (Sundquist's) credit was changed by giving him $604.00 in cash and a certificate of deposit for $100.00, and crediting Izella J. Smith with $1296.00. The contention that Miss Smith was given credit for this money is wholly without foundation, as there is not a particle of evidence in the record to sustain the assertion. In a number of places in their brief, counsel for appellant refer to the certificate of deposit "issued to Miss Smith." The only certificate issued to her was the written notice from the bank that $1296.00 had been deposited to pay the Gustafson note and mortgage held by her and asking her to send release of mortgage. The cer-

tificate appellant refers to as creating a credit in favor of Miss Smith was never issued to anybody and did not make her a creditor of the bank. How can there be a change of credit without a creditor?

When the bank paid Sundquist $2000.00 for its two negotiable certificates of deposit (and it is estopped to deny payment), its outstanding obligations were reduced by that amount and also the cash on hand to the same extent. With the surrender and cancellation of the certificates, the relation of debtor and creditor between the bank and Sundquist terminated as to this particular two thousand, and a new contract was necessary if he again became a creditor. The $1296.00 was left with the bank as bailee for the special purpose of paying the note and mortgage held by Miss Smith; $604.00 was retained by Sundquist, and he again became a creditor to the amount of the $100.00 certificate. The title to and ownership of the $1296.00 would remain in Sundquist until the surrender to him and cancellation of the note and mortgage. It is idle to talk about a transfer of credit when the fund in controversy could not, under the conditions of the bailment, be credited to any person, but had to be applied in payment of the note and mortgage. It therefore necessarily follows that the wrongful commingling of this money with the general funds of the bank, whether by the officers of the bank or the receiver, has aug-

mented the cash assets in the hands of the receiver in the sum of $1296.00.

Counsel for appellant have cited and quoted numerous authorities in support of their contentions that in the case at bar the transaction between the bank and Sundquist merely transferred a general credit of $1296.00 in favor of Sundquist to a general credit in favor of Miss Smith, and that therefore no trust fund in fact existed. But, the record shows conclusively that an express contract of bailment was entered into between the bank and Sundquist, by the terms of which the $1296.00 became a special deposit and trust fund and not a general credit in favor of Miss Smith. The cases cited by appellant are, therefore, not in point and we consider further reference thereto unnecessary.

Under the sub-title "Burden of Proof," counsel for appellant in their brief say (p. 228):

> "From what has been said, it will appear that the burden of proof of establishing and tracing a trust fund is on the claimant. The certificate for $1296.00 was issued on August 31. The record is silent *as to what cash was in the bank at that time* or at any other time up to September 21, when the bank failed. The only evidence as to cash in bank at date of failure was that of Mr. Gilchrist, who testified that there was between $20.000 and $30,000 in the bank, as he remembered it, when the bank closed. There is no attempt to trace

> this supposed trust fund into any other asset than cash. There is no showing that there was maintained in the vaults of the bank a sum equal to or in excess of $1296.00 from August 31 to September 31."

That such an assertion as the foregoing should be made, in the face of the uncontradicted testimony as shown by the record, is, to say the least, surprising. It is not the only misrepresentation of fact on the part of appellant, and while we believe it is all unintentional and inadvertant, the fact remains that each and all of the erroneous statements favor the appellant. In regard to the above statement as to the funds in the bank, the vice-president of the bank, C. S. Gilchrist, testified as follows (Tr. p. 30):

> "That there was that amount of money in the bank at that time and up to the time it closed."

Upon the erroneous assumption that there was no showing as to the amount of cash in the bank from date of deposit to closing of the bank, counsel for appellant proceed to cite authorities to the effect that such showing was necessary. We deem further discussion of this matter unnecessary.

In their citation of authorities in support of their contentions in this case, counsel for appelant have apparently carefully avoided the decisions of this Court. We think these decisions and the authorities

therein referred to cover all of the questions presented by this appeal, and we will therefore confine our citations to those cases.

In *Merchants National Bank v. School District No. Eight*, 94 Fed. 707, in considering the contention that no money was ever actually deposited with the insolvent bank, this court said:

> "It is contended that the finding of the master, to the effect that Palmer deposited with the bank the sum of $13,056, is at variance with the facts as they are disclosed in the evidence. It appears from the evidence that the bonds were sold in Boston, and that the sum realized thereon was deposited with the National City Bank of Boston, which bank was the correspondent of the Helena bank. The Boston bank notified the Helena bank that that amount had been placed to the credit of the latter by a letter which was received by the bank at Helena on July 11, 1896. On July 3rd the Helena bank had with the Boston bank a credit of $39,011.60, against which it drew on that day the sum of $10,000, leaving a balance of $29,-011.60, which was not further reduced until July 13th, when a draft for $8,075 was drawn against it. On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for $13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. It is not ma-

> terial in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston, and that, upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the arrangement which was consummated."

We desire to direct particular attention to the latter part of above decision:

> "The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or the School District. Instead of so paying the money, it chose to enter into the agreement which was consummated."

So in this case, the United States National Bank of Centralia could have paid in cash to Sundquist the entire $2000 evidenced by the paid certificates of deposit, but instead of so doing it chose to enter into the contract for the special deposit of $1296.00 of said sum. It is entirely immaterial that the record does not show that the $2000 was actually counted out and touched by Sundquist. Counsel for appellant contend that a depositor in a National

bank cannot use any part of the funds in his general account with the bank for the creation of a special deposit, unless he actually receives the cash from the bank, counts the same, goes out of the bank, turns around (whether once or twice is not stated), comes back and makes the special deposit. Our theory of the transaction is that by express contract between the parties—the bank and Sundquist—a trust fund was created for the purpose of paying the note and mortgage held by Miss Smith; that the bank assumed the duty of executing the trust, and that the receiver as its represenative is bound thereby, and in support of that view we refer to the case of *Montague v. Pacific Bank*, 81 Fed. Rep. 605, in which this court said:

> "In *People v. City Bank of Rochester*, 96 N. Y. 32, the principal facts were these: The City Bank of Rochester had discounted certain notes for the firm of Sartwell, Hough & Ford, a depositor with it, and that firm, wishing to anticipate the payment of these notes, gave to the bank its checks for the amount of the notes, less rebate of interest, which checks the bank received, and charged in the firm account, and entries were made in the bank books to the effect that the notes were paid. The firm at the time supposed that the bank held the notes, but they had in fact been previously sold by it. Before the notes became due, the bank failed; and in an action brought by the attorney general in the name of the people a receiver was appointed of its property and effects. The firm made an application to the

court, requiring the receiver to pay the notes out of the funds in his hands. This was finally granted, and an appeal was thereupon taken. Danforth, J., after stating the facts as above, said:

'The transaction in question was not between the bank and Startwell, Hough & Ford in their relation of debtor and creditor, nor in their relation of bank and depositor. The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled. (Citing *Libby v. Hopkins*, 104 U. S. 303; *in re* Le Blanc, 14 Hun. 8, affirmed 75 N. Y. 598.) * * * The checks of the petitioner were money assets in the hands of the bank, and were so treated by all parties. They were delivered to it with explicit directions to apply the proceeds on payment of the notes. Those directions were assented to by the bank officer, and the checks collected from the general fund. From that moment the bank was bound to hold the money for, and apply it to, that purpose, and no other, or, failing to do so, return it to the petitioner. As to it, the bank was bailee or trustee, but never owner. It is estopped from saying that all this is a matter of bookkeeping. It assumed a duty, and the receiver, as its representative, is bound by it. Nor does this obligation at all depend, as the appellant seems to suppose, upon the question when, where, and to whom the notes were to be paid. Whether presently or in the future is immaterial. The specific object for

> which the fund was created was the payment of the notes, and its character does not depend upon those incidental circumstances. The checks were impressed with a trust, and no change of them into any other shape could divest it so as to give the bank or its receiver any different or more valid claim in respect to them than the bank had before the conversion'."

By entering into the contract, which the uncontradicted testimony shows was entered into with Sundquist, the bank admitted that it at that time received from Sundquist and had in its possession that specific sum, and the bank and its receiver are estopped from denying that such was the fact; and when it is once shown that a trust fund has been created, and a sum equal to it is found in the bank, it is presumed that the sum in the bank represents the trust fund; if that amount of money was not in fact in the vaults of the bank between the date of the deposit and failure of the bank, that fact might, perhaps, be set up by way of defense, but under the pleadings in this case it is not an issue.

Moreland v. Brown, 86 Fed. Rep. 259; C. C. A. 9th Circuit.

Montague v. Pacific Bank, supra.

Merchants National Bank v. School District No. Eight, supra.

Carlson v. Kies, 75 Wash. 177, *supra.*

Massey v. Fisher, 62 Fed. Rep. 958.

FORM OF DECREE.

Under above caption, counsel in their brief contend that the form of the decree entered in this case is objectionable, in that it provides for a money judgment in favor of Sundquist against the Receiver to forthwith pay Sundquist the sum of $1296.00 with costs and disbursements.

The record shows that this $1296.00 was the property of Sundquist; that the fund came into the hands of the Receiver when he entered into possession of the bank and its affairs; that this particular fund was not assets in the hands of the Receiver for ratable distribution, but belonged to Sundquist, and that it was the duty of the Receiver to deliver the same to Sundquist.

Scott v. Armstrong, 146 U. S. 499;

Corn Exchange Bank v. Blye, 4 N. E. Rep. 635.

What other form of decree could the Court render than one directing the delivery to Sundquist of his property? The cases cited by appellant have no application to the facts in this case. The Receiver came into possession of this fund, to which he never had any right or title, on the 21st of September,

1914, and is still in possession of it. As this is an equitable case, we think the appellee is not only entitled to the immediate possession of his property, with costs and disbursements, but also to interest on the principal—$1296.00—from the 21st of September, 1914, until paid.

Respectfully submitted,

B. A. CROWL,

Solicitor for Appellee John E. Sundquist.